Supreme Court, U.S.
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No.

**In the Supreme Court of the United States**

EDISON PILGRIM CRAWFORD,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the fact of a prior conviction must be pleaded in the indictment and admitted by the defendant or found beyond a reasonable doubt by a jury when the prior conviction gives rise to a mandatory minimum sentence above the prescribed statutory maximum for the charged offense?

2. Whether this Court should further define "generic burglary" when that term has proved unworkable and leads to inconsistent application of the Armed Career Criminal Act?

3. Whether, based on the facts of Petitioner's case, the application of the Armed Career Criminal Act's fifteen-year mandatory minimum sentence violates the Eighth Amendment's protection against cruel and unusual punishment?

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## PETITION FOR A WRIT OF CERTIORARI

Edison Pilgrim Crawford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit is unpublished. (Pet. App. 1-4). The United States Court of Appeals for the Fourth Circuit denied Mr. Crawford's petition for rehearing. (Pet. App. 5)

## JURISDICTION

This action originally arose under 18 U.S.C. § 922(g)(1) and 21 U.S.C. § 844; accordingly, the district court had exclusive jurisdiction pursuant to 18 U.S.C. § 3231. On July 22, 2005, the district court issued a final sentencing order, which was the basis of Petitioner's appeal. The United States Court of Appeals for the Fourth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over a final order subject to appeal, and 18 U.S.C. § 3742, which provides for review of a federal sentence. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 922(g)(1) of Title 18 of the United States Code provides, in pertinent part: "It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to possess * * * or receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce."

Section 924(e)(1) of Title 18 of the United States Code provides, in pertinent part: "In the case of a person who violates Section 922(g) of this title and has three previous convictions by any court referred to in Section 922(g)(1) of this title for a violent felony * * * committed on occasions different from one another, such person shall be * * * imprisoned not less than fifteen years * * *."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be subject for the same offense to be twice put in jeopardy * * * nor be deprived of * * * liberty * * * without due process of law * * *."

The Sixth Amendment of the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * *."

The Eighth Amendment of the Constitution of the United States provides, in pertinent part: "* * * nor cruel and unusual punishments inflicted."

## STATEMENT

On June 30, 2003, Petitioner entered a plea of guilty, pursuant to a written plea agreement, in the United States District Court for the Western District of Virginia, on two charges contained in a criminal information. (Pet. App. 6-8). Count One alleged Crawford violated 18 U.S.C. § 922(g)(1) by being a felon in possession of a firearm, and Count Two alleged a violation of 21 U.S.C. § 844 for illegal possession of marijuana. As part of the plea agreement, the government would recommend that Crawford be sentenced at the low end of the applicable guideline range, which all parties believed was 18-24 months. (Pet. App. 6) The plea agreement further stated, and was similarly read to the district court at the plea hearing, that Crawford faced a maximum potential sentence of ten years for the firearms charge. (Pet. App. 6, 9)

Following the entry of Petitioner's plea, a PreSentence Report ("PSR") was returned by the United States Probation Office on August 7, 2003. The PSR recognized that Crawford had a criminal history score of zero (Category I offender) but suggested that Crawford's criminal history, which included three prior convictions for breaking and entering, made Petitioner eligible for the imposition of a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e). (Pet. App. 11-12). The convictions in question occurred over a three-day span thirty-two years prior to the instant offenses (1971), and there is no record on file referencing the statute of conviction for these offenses. (Pet. App. 13-18).

Crawford filed a motion with the district court requesting specific performance of the previously accepted written plea agreement. The district court denied Petitioner's motion and further held that Crawford's only available options were to proceed to sentencing or withdraw his plea

agreement and proceed to trial. Prior to entering his plea, Petitioner filed an interlocutory appeal before the Fourth Circuit challenging the impending potential application of the ACCA. The Fourth Circuit denied his appeal for lack of jurisdiction. Petitioner then petitioned this Court for a writ of certiorari, which was also denied, presumably on jurisdictional grounds.

On April 26, 2005, Crawford filed a Motion to Reconsider the Application of 18 U.S.C. § 924(e) and on July 18, 2005, filed a Supplemental Motion for Reconsideration Citing Additional Authority. Both motions were denied. On July 22, 2005, Petitioner decided not to withdraw his plea of guilty. The district court ruled that the ACCA applied and proceeded to impose the fifteen-year mandatory minimum sentence. Petitioner appealed his sentence to the Fourth Circuit, which affirmed the district court's finding that his sentence was proper under the ACCA. (Pet. App. 1-4).

## REASONS FOR GRANTING THE WRIT

If Petitioner is correct in his belief that this Court's precedent begun in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and now solidified in *Blakely v. Washington*, 542 U.S. 296 (2004) and *Booker v. United States*, 543 U.S. 220 (2005), mandates that any fact that increases the maximum penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt, then this Court should grant certiorari and overturn *Almendarez-Torres v. United States* to the extent that it conflicts with the principles espoused in *Apprendi*. 523 U.S. 224 (1998) (holding that prior convictions need not be charged in the indictment or proved beyond a reasonable doubt). For the reasons explained in Part I.b. *infra*, *stare decisis* concerns are de minimis in the context of the prior conviction exception to *Apprendi* and should not interfere with this Court's decision to overrule or

limit *Almendarez-Torres* when its holding presents the only obstacle to bringing this Court's recent Fifth and Sixth Amendment rulings into harmony.

Regardless of whether this Court accepts Petitioner's invitation to overrule *Almendarez-Torres*, this Court should further define "generic" burglary as it applies to the application of the ACCA. The outcome targeted by this Court's decision in *Taylor v. United States* -- equal application of the ACCA regardless of the State of conviction's definition of burglary -- has fallen short in that the ACCA remains a federal law too often dependent on State burglary statutes and definitions as opposed to one universally accepted and enforced classification. 495 U.S. 575, 599 (1990) (defining burglary under the ACCA as "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime").

Lastly, this Court should find that under the facts of Petitioner's case, the application of the ACCA constitutes a violation of the Eighth Amendment's protection against cruel and unusual punishment in that imposition of a fifteen-year mandatory minimum sentence is disproportionate and unconstitutional as applied to Petitioner.

## I. THIS COURT SHOULD FIND THAT FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. § 924(e), CONTESTED PRIOR CONVICTIONS THAT INCREASE A DEFENDANT'S SENTENCE BEYOND THE STATUTORY MAXIMUM FOR THE CHARGED OFFENSE CONSITUTE ELEMENTS OF THE OFFENSE AND MUST BE CHARGED IN THE INDICTMENT, SUBMITTED TO THE JURY, AND PROVED BEYOND A REASONABLE DOUBT

The issue regarding whether certain factors constitute sentence enhancements or elements of an offense continues to plague federal criminal litigation. This Court's recent decisions post-*Apprendi* have raised doubt as to whether *Almendarez-Torres*' treatment of prior convictions was correct to the extent that it characterized their existence as sentencing factors as opposed to elements of an offense that must be placed before the jury and proved beyond a reasonable doubt. Recent holdings suggest that *Almendarez-Torres*' element versus sentencing factor analysis incorrectly shifted the focus from Sixth Amendment protections to the traditional practice of judicial fact-finding at sentencing.

The question presented by this case is an important question of federal law. Due to the severe penalties that result from recidivist statutes, such as the ACCA, and their increased use across the country, countless defendants are sentenced for time periods that extend much longer than the maximum permitted for the charged crime, without ever having their prior convictions placed before the jury. This Court should take the opportunity to clarify this issue once and for all and determine that any fact, which serves to increase a defendant's maximum sentence, constitutes an

element of the offense that must be submitted to the jury and proved beyond a reasonable doubt.

### a. The Reasoning Employed in *Almendarez-Torres* is in Conflict With This Court's Intervening Decisions

This Court is no stranger to the Fifth and Sixth Amendment claims presented in this Petition. Perhaps no other area of criminal law has been so affected by this Court's recent decisions ensuring that due process and the right to trial by jury are not eviscerated by creative legislation that removes facts used to increase a defendant's sentence from the jury and places them in the hands of a judge operating under a lower standard of proof. *See Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2002); *Harris v. United States*, 536 U.S. 545 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Booker v. United States*, 543 U.S. 220 (2005). One remnant of the old Fifth and Sixth Amendment jurisprudence remains intact, however, albeit substantially weakened in recent years – the prior conviction exception to *Apprendi's* holding that "any fact that increases the maximum penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Despite this Court's familiarity with the question presented, it bears mentioning that this Court has repeatedly called into question the holding in *Almendarez-Torres* that the fact of a prior conviction is not an element of the offense and need not be charged in the indictment or proved beyond a reasonable doubt. 523 U.S. at 247. Additionally, this Court has openly acknowledged that the votes now exist to overturn *Almendarez-Torres* and the prior conviction exception to the rights afforded citizens under the Fifth and Sixth Amendments. *See Shepard v. United States*, 544 U.S.

13, 27 (2005) (Thomas, J., concurring) ("a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."). At the very least, Petitioner's case directly raises the recidivist issue discussed but not decided in *Apprendi*:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

530 U.S. at 489-90.

In the case at bar, Petitioner clearly meets the *Apprendi* principle disallowing an increase in a defendant's sentence beyond the prescribed statutory maximum on facts not proved beyond a reasonable doubt. *Id.* In fact, never has the tail so violently wagged the dog than in the context of the ACCA, where the Constitution has compelled the government to provide a defendant with a jury trial on the ten-year maximum offense, but *Almendarez-Torres* has mandated that the same defendant be denied a jury trial on the fifteen-year mandatory minimum one. To gauge the impact of *Almendarez-Torres*' holding, one need look no further than the facts of the instant case where the recommended guideline sentence would have been eighteen months but the ACCA mandated a sentence of 180 months founded only on the unclear and unreliable wording used in a 1971 Virginia court record. *See* Pet. App. 11-16; *see also* Part I.b. *infra*.

This Court's Fifth and Sixth Amendment jurisprudence compels the overturning of *Almendarez-Torres* or, in the alternative, should at the very least limit the prior conviction exception to situations similar to that presented in *Almendarez-Torres* – where the prior convictions are uncontested and there is no dispute as to whether the underlying facts qualify under a recidivist statute.[1] As outlined below, any potential *stare decisis* concerns are de minimis in the context of overruling *Almendarez-Torres*.

**b. This Court's *Stare Decisis* Obligations Support the Overruling of *Almendarez-Torres***

A mere showing or belief that *Almendarez-Torres* was wrongly decided does not end this Court's analysis of whether to revisit and overrule the issue. *Stare decisis* concerns must be quelled before attempting to undo a decision of this Court lest important decisions of great precedential value and impact be reviewed whenever circumstance alters the membership of the Court. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992) ("...a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."); *see also Mitchell v. W.T. Grant*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (arguing that overturning precedent upon membership changes diminishes that which differentiates the judiciary from the legislative and executive branches).

For the purposes of *stare decisis*, this Court's precedential inquiry centers on whether a prior rule has

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[1] 523 U.S. at 247-48 (finding that the defendant in *Almendarez-Torres* entered into a plea agreement acknowledging his post-deportation unlawful entry into the United States and that the prior deportation was founded on his three prior convictions for "violent felonies").

proved unworkable; whether past reliance has impacted the way people have thought and lived; whether developments in related principles have left the rule nothing more than "a remnant of abandoned doctrine;" or whether facts have so changed to render a prior holding obsolete. *Casey*, 505 U.S. at 854-55. Under such an inquiry, it is readily apparent that *stare decisis* provides no obstacle to this Court's ability to correct a recognized wrong.

First, for reasons further explained in Part II.a. *infra*, the prior conviction exception to *Apprendi* and its progeny has proved unworkable in the context of the ACCA in that what constitutes "generic" burglary often hinges on various conflicting State statutes, the various definitions of "building and structure" and the adequacy of judicial record-keeping among the States. While this Court's decision in *Taylor* sought to eliminate the potential for unequal and arbitrary application of the ACCA, *Shepard* and countless other cases have demonstrated that the "generic" burglary definition has proven unworkable in that the ACCA's fifteen-year mandatory minimum now hinges less on a defendant's actual prior conduct and more on which State a defendant chose as the scene of his offense – thereby exacerbating the very harm *Taylor* sought to avoid.

Second, concerns over past reliance are absent from the prior conviction analysis in that the ACCA has not noticeably impacted how citizens decide to live their lives on a day-to-day basis. Unlike the situation present in *Casey*, the only potential social impact of the crumbling down of *Almendarez-Torres* is that defendants will now have the opportunity to challenge their qualifying convictions under an appropriate standard of proof, and the government will bear the burden of establishing one additional element in situations where a defendant does not admit to the

applicability of the prior conviction or fails to waive its determination by a jury.

Third, and perhaps most compelling, this Court's recent Fifth and Sixth Amendment holdings with regard to elements versus sentencing enhancements, and the need to avoid whittling the Constitution's trial by jury guarantees, has brought within the Sixth Amendment vast factors and principles of which only prior convictions remain outside the Sixth Amendment's reach. *Almendarez-Torres* is itself a remnant of an abandoned doctrine that has been left so weakened by this Court's recent decisions that virtually every Circuit has recognized its vulnerability, yet remain obligated to follow its precedent in the absence of this Court's instructions otherwise.[2] *See Agostini v. Felton*, 521 U.S. 203,

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[2] *See United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005) (finding that the court was bound by *Almendarez-Torres* and *Agostini*); *United States v. Ordaz*, 398 F.3d 236, 241 (3rd Cir., 2005) (acknowledging tension between recent Sixth Amendment cases and *Almendarez-Torres*, but recognizing that it remains the law until the Supreme Court rules otherwise); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) ("But no matter how much in doubt the continuing viability of *Almendarez-Torres* may be, that decision is not overruled unless and until the United States Supreme Court says it is."); *United States v. Murillo-Iniguez*, 318 F.3d 709, 713 (6th Cir. 2003) ("We have said, '[a]lthough the Court's decision in *Apprendi* arguably casts doubt on the correctness of the holding in *Almendarez-Torres*, .... *Almendarez-Torres* remains the law.'") (citations omitted); *United States v. Bock*, 312 F.3d 829, 831 (7th Cir. 2002) ("In short, the issue Bock raises, while effectively a settled one, is one on which reasonable minds might disagree. It is not out of the question that the issue might be reexamined by the Supreme Court."); *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1068 n. 3 (8th Cir. 2002) ("Concerned that the Supreme Court has noted but not resolved the issue, the district court applied the clear-and-convincing standard of proof in finding that Rodriguez committed an aggravated felony for sentencing purposes because the issue significantly affected the severity of his sentence."); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) ("[u]nless and until *Almendarez-Torres* is overruled by the Supreme Court, we must follow it"); *United States v. Marseille*, 377 F.3d

237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Furthermore, *Casey*, for example, indicated that *stare decisis* precluded review of *Roe v. Wade*, 410 U.S. 113 (1973) because that decision's central holding "fit comfortably within" this Court's previous cases that extended the privacy rights afforded citizens to include marriage, procreation, education, contraception, etc. 505 U.S. at 857. In the present case, the opposite is true in that *Almendarez-Torres* not only appears to contradict the framework of this Court's more recent decisions but, rather, serves as a barrier to the natural extension of this Court's holdings as to what the rights to due process and trial by jury encompass.

Fourth, with the draconian implications of the ACCA and other statutes that increase punishment many fold based only on prior convictions, especially those that do not clearly qualify on their face (under a non-generic burglary statute, for example), the factual assumptions relied on by this Court in *Almendarez-Torres* are belied by intervening decisions. Namely, *Almendarez-Torres* found support in the fact that at the time of its ruling, a judge, as opposed to a jury, could find the factors that made a defendant eligible for the death penalty, 523 U.S. at 247 – a position later rejected by this Court in *Ring v. Arizona*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

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1249, 1257 (11th Cir. 2004) ("Marseille asks this court to extend *Apprendi*' s rationale and overrule *Almendarez-Torres*... [H]is wish is beyond our powers to grant.")

Additionally, *Almendarez-Torres* expressed "no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of the sentence," primarily because the defendant admitted to his recidivism in his plea and failed to show how a more stringent standard of proof would have compelled a different result. 523 U.S. at 247-48. The simple fact is that despite this Court's limiting language, *Almendarez-Torres* has been extended to encompass all prior convictions, disputed or not, and regardless of the impact on the severity of the sentence, even though this Court issued a much narrower holding limited to uncontested and clearly qualifying prior convictions. *See Apprendi*, 530 U.S. at 488 ("Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.").

With the onset of increased ACCA litigation courts are no longer instructed to "see" whether a conviction exists but, rather, are compelled to compare the State's burglary statute to this Court's "generic" burglary definition and in many cases, inspect decades old court records to determine the elements of the offense on the date of conviction.[3] Once having determined the fact of a prior conviction, courts must then determine the facts supporting the conviction. *See* Part II.a *infra*. This type of analysis was beyond the issues presented in *Almendarez-Torres* and, therefore, warrants review of its holding. *See Apprendi*, 530 U.S. at 488 ("no question concerning the right to a jury trial or the standard of

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[3] *See* Part II.a *infra* (detailing this Court's decision that outlined "generic" burglary for the purposes of the ACCA).

proof that would apply to a contested issue of fact was before the Court [in *Almendarez-Torres*].").

In light of the foregoing argument, Petitioner submits that this Court's reversal of *Almendarez-Torres* will strengthen its recent Fifth and Sixth Amendment determinations and leave its *stare decisis* jurisprudence unharmed.

## II. THIS COURT SHOULD FURTHER DEFINE "GENERIC" BURGLARY WHERE THE APPLICATION OF THE ACCA CONTINUES TO HINGE PRIMARILY ON STATE BURGLARY STATUTES AS OPPOSED TO SIMILAR CONDUCT

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court was called upon to determine the meaning of the word "burglary" in the context of the ACCA. The Court of Appeals for the Eighth Circuit had previously determined that the word "burglary" in the ACCA meant 'burglary' however the State of prior conviction chose to define it. Confronted with wide variations among the States' various burglary statutes, this Court sought to develop a "generic" burglary definition in order to prevent the arbitrary and inconsistent application of the ACCA and its fifteen-year mandatory minimum penalty. Put simply, this Court's purpose in providing a generic burglary definition for the ACCA was to eliminate the potential that similarly situated defendants, guilty of the same underlying prior conduct, would be treated differently under the ACCA simply upon how their state of conviction chose to draft its burglary statute. *Taylor*, 495 U.S. at 592 ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."). The *Taylor* Court thus settled on what it termed the "generic"

definition of burglary, defined as "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Having defined "burglary" for the purposes of § 924(e), this Court found that it "must address the question whether, in the case of a defendant who has been convicted under a non-generic burglary statute, the Government may seek [application of the ACCA] on the ground that he actually committed a generic burglary." *Id.* at 600. On this issue, the Court held that an offense qualifies as "burglary" under a non-generic statute, for purposes of the ACCA, if the statute of conviction "substantially corresponds to 'generic' burglary, or the charging paper *and* jury instructions actually *required* the jury to find *all* the elements of generic burglary in order to convict the defendant." *Id.* (Emphasis added). However, as illustrated below, *Taylor's* goal is frustrated by the varying State definitions for "building or structure" within burglary statutes.

**a. This Court has not Sufficiently Defined "Generic" Burglary in Order to Prevent Unequal Application of the ACCA in all Cases**

It is submitted that *Taylor's* definition of "generic" burglary did not solve this Court's legitimate concern that "in terms of fundamental fairness, the [ACCA] should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582; *quoting* S. Rep. No. 98-190, p. 20 (1983). The reason being that while the States have various definitions of what constitutes burglary (whether it was

burglary of a dwelling, whether it occurred in the nighttime, etc.) they also have varying definitions of what constitutes a "building or structure" for the purposes of their own burglary statutes. Thus, for example, the breaking and entering into a fenced-in area constitutes a burglary in one State while it does not in another State where a fence has been adjudicated not to qualify as a structure for the State's burglary statute. *Compare State v. Foulenfont*, 119 N.M. 788, 895 P.2d 1329 (N.M. Ct. App. 1995) (holding that a fence did not fall within the State's burglary statute's language of "or other structure"), *and State v. Gamble*, 56 N.C. App. 55, 286 S.E.2d 804 (N.C. Ct. App. 1982) (fenced-in area does not constitute a building or structure under breaking and entering statute) *with Joy v. State*, 460 N.E.2d 551 (Ind. Ct. App. 1984) (fence surrounding lumber company constituted a structure), *and Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (Ark. Ct. App. 1992) (fence surrounding business is a structure under breaking and entering statute), *and Baker v. State*, 636 So.2d 1342 (Fla. 1994) (entry into curtilage protected by fence and shrubbery constitutes entering a dwelling).

In the instant case, the government proposed an expansive reading of *Taylor*, which would find that an individual has committed generic burglary whenever she has unlawfully entered a structure in which things are stored. However, most states have not accepted such a broad definition for the purpose of their own burglary statutes. *See State v. Moler*, 269 Kan. 362, 366-67, 2 P.3d 773, 776-77 (2000). ("In its broad sense, under either the general dictionary definition or Black's definition, virtually anything capable of being constructed could be called a structure and would, therefore, be legally capable of being burglarized. We declined to adopt that construction.") *citing State v. Fisher*, 232 Kan. 760, 761, 658 P.2d 1021, 1022 (1983); *see also* n. 5 *infra*.

A recent example of a Circuit Court failing to employ such an expansive definition for the purposes of qualifying a prior conviction for the ACCA can be found in *United States v. Sparks*, 265 F.3d 825 (9th Cir. 2001). In *Sparks*, the defendant had a prior burglary conviction in Alaska for entering "storage lockers...with intent to commit theft." *Id.* at 835. In considering whether the Alaska conviction qualified as a predicate offense under the ACCA, the *Sparks* court found that the question centered on whether a storage locker qualified as a "building or structure" under *Taylor's* definition of generic burglary. *Id.* However, the indictment and guilty plea were completely silent on the "nature, size, or configuration" of the lockers. *Id.* The *Sparks* court found that even though *Taylor* excepted from generic burglary the requirement that a person actually be present in the building or structure for the conviction to qualify under the ACCA, the record *must show* that it was *at least possible* that someone could be inside the structure that was burglarized for it to qualify as a predicate burglary under the ACCA:

> According to Sparks' indictment and judgment, we know only that he broke into storage lockers. Because *we cannot tell from this record whether these lockers were large enough to accommodate a person*, Sparks did not commit generic burglary, and the district court erred when it counted Sparks' prior burglary of ten storage lockers toward his status as an Armed Career Criminal.

*Id.* at 837. (Emphasis added).[4]

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[4] Petitioner is unaware of any such requirement, for the purpose of Virginia's burglary statute or the Fourth Circuit's ACCA analysis, that the subject of a burglary be large enough to accommodate a person, although several States and the Ninth Circuit do require such a showing.

Failing to require a showing that the challenged structure was capable of housing a person creates an expansive definition that could, for example, apply equally to a building or a toolbox, turning *Taylor* and the ACCA on its head by not at least considering the "inherent *potential* for harm to persons."[5] *Sparks*, 265 F.3d at 835 (*quoting Taylor*, 495 U.S. at 588) (emphasis added).

A further example of the ACCA's current unequal application is a simple comparison between Georgia's and Virginia's definition of a building or structure with regard to permanent affixation to the ground. In *Franks v. State*, 240 Ga. App. 685, 524 S.E.2d 545 (1999), the defendant appealed his State burglary conviction on the ground that he had burglarized a trailer that was not permanently affixed to the ground and, therefore, could not qualify as a "building" under Georgia's burglary statute. The Georgia Court of Appeals held that Georgia's burglary statute did not require that the burglarized structure be permanently attached to the ground. 240 Ga. App. at 688, 524 S.E.2d at 548 ("The fact that the trailer could be moved without having to dislodge it from the ground did not diminish its capacity to function as a storehouse."). In complete contrast to Georgia, however, the Virginia Court of Appeals has held that "in order for a structure to be the subject of burglary, the structure *must* be

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[5] *Compare J.C. v. State*, 695 So.2d 765 (Fla. Dist. Ct. App. 1997) (large recycling container appurtenant to an elementary school constitutes a structure), *and State v. Nichols*, 181 Ariz. 56, 887 P.2d 586 (Ariz. Ct. App. 1994) (trash dumpster constitutes structure), *and State v. Mann*, 129 Ariz. 24, 628 P.2d 61 (Ariz. Ct. App. 1981) (Salvation Army collection box constitutes a structure under burglary statute) *with State v. Smothers*, 590 N.W.2d 721 (Iowa 1999) (exempting boxes, chests, safes, changers and any storage item that is too small to physically contain a person from the burglary statutes' reach), *and State v. Miller*, 90 Wash. App. 720, 954 P.2d 925 (Wash. Ct. App. 1998) (a structure too small for a human being to live in or do business in was not a "building" or a "structure" under the burglary statute).

permanently affixed to the ground so as to become a part of the realty at the time of the unlawful entry." *Dalton v. Commonwealth*, 14 Va. App. 544, 548, 418 S.E.2d 563, 565 (1992). (Emphasis added).[6]

Therefore, as evidenced by the contrast between Georgia's and Virginia's burglary statutes, only the burglary of a structure permanently affixed to the ground would satisfy both the Georgia and Virginia statutes and thus qualify as "generic" under the ACCA.[7] If not, similarly situated defendants guilty of the same underlying conduct would be treated very differently by the ACCA simply based on whether their States of conviction decided to make permanent affixation a necessary prerequisite to "generic" burglary. Similarly, as referenced *supra*, the breaking and entering into a fenced-in area would meet the definition of building or structure in Indiana, Arkansas, and Florida but not New Mexico or North Carolina – meaning a North Carolinian would have no record of a qualifying prior conviction while a Floridian would, for no other reason than geography.

Such a situation presents the "odd result" *Taylor* sought to avoid in that "a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction

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[6] Further complicating the "generic" burglary analysis is that Mr. Crawford's prior convictions occurred in 1971. The *Dalton* decision, holding that the subject of a burglary must be permanently affixed to the ground, was reached in 1992, twenty-one years after the date of Mr. Crawford's prior convictions. On this record, it is unclear whether the subject of Mr. Crawford's prior convictions would have complied with *Dalton's* requirement of permanent affixation.

[7] *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining generic as "relating to or descriptive of *an entire group or class*") (emphasis added).

happened to call that conduct burglary." 495 U.S. at 591. While this Court sought to define generic burglary to ensure equal application of the ACCA in a way that would not depend on state law, clearly state law continues to play a significant role in determining the difference between a ten-year maximum sentence and a fifteen-year mandatory minimum one. Therefore, "generic" burglary for the purposes of ACCA, must limit the definition of "building or structure" in a way that ensures that every State at a minimum includes that specific object or location within its burglary statute. *See Taylor*, 495 U.S. at 591 ("absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, 'because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control.'") *quoting Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-120 (1983).

**b. The Records Detailing Petitioner's Prior Convictions do not Clearly Reveal What Type of Buildings or Structures, if any, were the Subject of his 1971 Burglary Convictions**

In the instant case, all three of Petitioner's prior breaking and entering convictions are believed to have been under Virginia Code Section 18.1-89 (as amended 1970). Code Section 18.1-89 criminalizes the intent to commit larceny, or any other felony other than murder, robbery and rape, if coupled with any of the acts prohibited by Code Section 18.1-88. Code Section 18.1-88 reads as follows:

> If any person in the nighttime enter without breaking or in the daytime break and enter a dwelling house or an outhouse adjoining thereto and occupied therewith or in the

> nighttime enter without breaking or break and enter either in the daytime or nighttime any office, shop, storehouse, warehouse, banking house, or other house, *or any ship, vessel or river craft or any railroad car, or any automobile, truck, or trailer*, if such automobile, truck or trailer is used as a dwelling or place of human habitation....shall be deemed guilty of statutory burglary....

(Emphasis added).[8] Code Section 18.1-89, therefore, is nongeneric for the same reason as those statutes the *Taylor* and *Shepard* Courts found to be nongeneric. On its face, Crawford's convictions would not qualify under the ACCA unless the government could show that Crawford was in fact charged and convicted only with the burglary of a qualifying building or structure. *Taylor*, 495 U.S. at 602 (stating, in the context of a jury trial, that the government had the burden of showing "that the jury necessarily had to find an entry of a building to convict" before being permitted to use the conviction for the ACCA).

In trials held without a jury (as in Petitioner's case), the government must meet its *Taylor* burden by showing that "the bench-trial judge's formal rulings of law and findings of fact" had necessarily rested on the fact that the underlying burglary was "generic." *Shepard*, 544 U.S. at 20. No bench-trial findings or rulings have been produced to narrow Crawford's prior convictions to "generic" status. Those

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[8] While Petitioner relies on the language employed in Code Sections 18.1-88 and 18.1-89 when discussing the elements of burglary, he concedes that it is unclear whether the statute analyzed was in fact the basis of his prior convictions because the available court records do not reference any statute. This uncertainty further underscores Petitioner's position that this Court should preclude the application of the ACCA in this case.

documents that have been located are either inconclusive on the "generic" burglary issue or prohibited by *Taylor* and *Shepard* from being used as reliable evidence of admitted or proven facts.

While common experience might suggest that the terms "garage" and "storehouse" necessarily encompass the actual breaking and entering into a "building" or "structure" under *Taylor*, the court is precluded from using "common experience" to arrive at that conclusion. The increasingly clear rule one can devise from the recent *Taylor* and *Shepard* line of cases, is that the underlying indictment must be 100% clear on its face, or else the prior conviction cannot be used to support any enhancement under the Sentencing Guidelines or the application of the ACCA.

In *Shepard*, for example, one complaint alleged that the defendant did break and enter "the building, ship, or vessel of Crispus Attucks Children's Center with the intent to commit a felony therein." 125 F. Supp. 2d 562, 566 (D. Mass. 2000). The trial court noted that the complaint application suggested that the defendant had entered a building by breaking a window, but refused to consider the application because *Taylor* prohibited the court from reviewing such a document. *Id.* Even though the description "Children's Center" might appear to suggest an entry into a building or structure, the district court found that the facts alleged in the complaint application had never been determined by a court or jury, and that at no point during the defendant's plea colloquy did he concede the facts alleged in the application -- that he actually entered into a building. *Id.*

Petitioner's prior convictions raise a similar issue to those found in *Shepard*. First and foremost, there is a considerable lack of information available regarding Crawford's 1971 convictions. Only Crawford's 1971 PSR,

the assumed statute of conviction, and the 1971 Greene County Court's indictment and sentencing documents have been produced to support the government's belief that Crawford's prior convictions were for "generic" burglary. However, the mere fact of Crawford's conviction, and the possible statutory definition of his prior offenses, simply does not show that Crawford was convicted only with breaking and entering a "qualifying" building or structure, hence "generic" burglary.

First, the 1971 PSR, as well as the current PSR, clearly cannot be considered for determining the nature of Crawford's prior convictions. *See Shepard*, 544 U.S. at 23 ("respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.").

Both the sentencing documents and the indictments use the same language when referencing Crawford's criminal acts. Two of the documents state that Crawford "did break and enter the garage of Powell Brothers," while the third document provides that he "did break and neter [sic] the storehouse of L.L. Shifflett." (Pet. App. 13-18). This language does no more than rename the presumed locations of the actual break-ins: Powell Brothers Garage and L.L. Shifflett's Storehouse. Significantly, what the documents do not provide is whether Crawford was actually found to have broken in to an actual building, as opposed to other possible places, such as an automobile present on the lot of Powell Brothers, a fence surrounding the Storehouse, a storage container used only for storing goods, etc.

"Garage of Powell Brothers" alone does not necessarily require a finding that Crawford entered a building, just as "Crispus Attucks Children's Center" did not

suffice in *Shepard*. Likewise, the term "storehouse" cited in the third of Crawford's indictment and sentencing documents is insufficient alone to find the conviction "generic" under *Taylor* and *Shepard*, because it is unclear as to what exactly constitutes a storehouse in Virginia, let alone the other 49 states, and whether that definition necessarily constitutes a building or structure for "generic" burglary purposes. For example, in *Dalton v. Commonwealth*, the Virginia Court of Appeals was called upon to determine whether the defendant's conviction under Virginia's statutory burglary statute should be reversed because the structure he was charged with breaking and entering was not a "storehouse" under Virginia Code Sections 18.2-90 and 18.2-91. 14 Va. App. 544, 545, 418 S.E.2d 563 (1992). The court acknowledged at the outset that the statute did not define the term "storehouse." *Id.* at 546. Left to its own devices, the court entered into a lengthy analysis of what constitutes a "storehouse" in Virginia, little of which is relevant here.[9] What is of great importance to Petitioner, however, is whether a Virginia court's definition of a "storehouse" is covered by the terms "building" and "structure" as employed by the *Taylor* court in defining "generic" burglary.

The issue raised in *Dalton* is not unlike that originally confronted by this Court in *Taylor*. The difficulty lies in determining whether a State's definition of a "storehouse" meets Congress' or this Court's definition of a qualifying "building or structure," just as the *Taylor* Court was called upon to determine whether a State's definition of "burglary" met Congress' definition of "generic" burglary. Because the mandatory imposition of a fifteen-year minimum sentence

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[9] The *Dalton* court described the qualifying structure as consisting of three sides of chain link fence. 14 Va. App. at 545-46. The fourth side was the side of a building that had a roof extending over the fenced-in area but did not touch the fenced-in sides, thereby leaving a substantial gap between the roof and the fencing. *Id.* at 546.

hangs in the balance, both subtle and overt distinctions between "storehouses" and "structures" should not be treated lightly.

Rather, in light of the ACCA's potentially draconian implications, the Fifth and Sixth Amendments to the United States Constitution, along with *Apprendi* and its progeny, require not only that prior convictions be submitted to the jury for proof beyond a reasonable doubt but that the definition of "burglary" be sufficiently delineated in order to ensure that "the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582; *quoting* S. Rep. No. 98-190, p. 20 (1983).

## III. THIS COURT SHOULD FIND THAT THE IMPOSITION OF A FIFTEEN-YEAR MANDATORY MINIMUM SENTENCE IS GROSSLY DISPROPORTIONATE TO PETIONER'S CRIMES OF CONVICTION AND CRIMINAL HISTORY AND, THEREFORE, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Without the mandatory minimum sentence imposed via the ACCA, Petitioner would have faced between 18-24 months of incarceration; as his sentence now stands, however, he faces fifteen years, or 180 months of incarceration. Weighing the fifteen-year sentence proposed in this case against Petitioner's offense of conviction and prior Criminal History (Category I), the penalty is disproportionate and unconstitutional as applied to him.

Three recent cases support the position that a minimum mandatory sentence under the ACCA violates the Eighth Amendment as applied to Crawford. Support comes from the Ninth Circuit in *Ramirez v. Castro*, 365 F.3d 755

(9th Cir. 2004), the District Court for Central California in *Banyard v. Duncan*, 342 F. Supp. 2d 865 (D. Cal. 2004), and the Delaware Supreme Court in *Crosby v. Delaware*, 824 A.2d 894 (Del. 2003). These recent cases demonstrate that *Solem* and its requirement of proportionality in criminal sentencing are still alive and well. *Solem v. Helm*, 463 U.S. 277 (1983).

*Ramirez* involved a defendant who was convicted of shoplifting a VCR and sentenced under California's Three-Strikes law to 25 years to life. In the absence of the application of that statute, he would have received a maximum of six months for the shoplifting. Castro's prior offenses included two other shoplifting charges committed within five years of the instant offense. 365 F.3d at 756. The Court ruled that the sentence imposed under the Three-Strikes law was grossly disproportionate to the crimes committed. *Id.* at 757.

The Court in *Ramirez* looked objectively at the facts of the case, including the facts surrounding the defendant's criminal history, much as the *Solem* Court did when it stated that the defendant's status cannot be viewed in the abstract. The *Ramirez* Court took into account the nonviolent nature of the offenses (even though the defendant had pushed a security guard as he fled the store), and the lapse of time between offenses (less than five years between the second and current offense) when determining the constitutionality of applying the Three-Strikes law. *Id.* at 768.

The facts in the case at bar are far more compelling than those in *Ramirez*. Crawford's prior offenses occurred over thirty-four (34) years – not merely five years—prior to the offense of conviction and they all were committed within a three-day span when he was only a teenager. All of the three thirty-four year old offenses were resolved in a single

court proceeding. Moreover, it is not alleged that Crawford's offenses occurred during hours when the locations were inhabited, if inhabitable at all, thus mitigating circumstances where a person could, by his unexpected presence, be put in danger. These facts make Crawford's ACCA sentence even more disproportionate than *Ramirez's* Three Strike sentence, which was found unconstitutional. The Ninth Circuit reversed the lower court's decision denying the defendant's habeas relief because it "erroneously characterizes and otherwise fails to consider the unique, objective factual circumstances of Ramirez's case." *Ramirez*, 365 F.3d at 775. Likewise, the objective factual circumstances in the instant case make the imposition of fifteen years grossly disproportionate and, therefore, unconstitutional.

Another recent case explored California's Three-Strike law and found the punishment it imposed to be disproportionate and thus unconstitutional. *Banyard,* 342 F. Supp. 2d 865. The *Banyard* court distilled the principles laid down in a series of Supreme Court cases including *Solem*, finding that the determination of proportionality in cases involving recidivist statutes must take into account the seriousness of the current offense and the offender's criminal history. *Id.* at 878. Putting these two objective factors on the scales together against the harshness of the penalty, a sentencing court can then determine whether a penalty is grossly disproportionate or not. *Id.* In *Banyard*, the court held that the scales were disproportionately heavy on the penalty side:

> Given the circumstances underlying Banyard's predicate "serious felony" convictions and the limited frequency and severity of his offenses, Banyard's criminal history is far less serious than those at issue in *Andrade*, *Ewing*, and even *Solem*. Neither the "harm caused or threatened

> to the victim or society," nor the "absolute magnitude" of Banyard's prior convictions justifies Banyard's sentence of twenty-five years to life in prison. *Solem*, 463 U.S. at 293. Unlike *Andrade*, which was held to lie on the "imprecise contours" of the gross disproportionality spectrum, Banyard's sentence is far more egregious than that imposed in *Solem* and is grossly disproportionate. This is one of the "rare case[s] in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

342 F. Supp. 2d at 881.

Banyard's current offense was possession of cocaine, a nonviolent felony, but his previous crimes included violent felonies—robbery and assault with a deadly weapon. *Id.* at 867. By contrast Petitioner's prior offenses involved no violence of any kind, nor were any of his offenses against the person of another. In fact, despite being labeled an armed career criminal, Petitioner is not alleged to have ever committed a crime while armed. Petitioner's current offense in the instant case related to the possession of firearms found in his home (located in a very rural area), not in connection with any crime of violence.

Finally, in *Crosby,* the Delaware Supreme Court addressed the state's habitual offender statute and the life sentence imposed on a defendant whose offense of conviction carried a maximum penalty of two years. 824 A.2d at 902. Crosby was convicted of forgery and criminal impersonation, classified at the lowest level for felonies in Delaware. *Id.* Due to his status as a habitual offender, the

state recommended a 10-year sentence, but the Superior Court sentenced him to life imprisonment, the maximum penalty under the habitual offender statute. *Id.* at 907. Crosby's criminal record included no less than five felonies and nine misdemeanor convictions in a sixteen-year period. *Id.* at 908. His offenses included, *inter alia*, assault, burglary, possession of cocaine with intent to distribute, and resisting arrest. *Id.*

Despite Crosby's lengthy criminal history, the Court determined that the life sentence was disproportionate to his offense of conviction. Although the Court recognized a legitimate interest in deterring habitual offenders, it held that "even repeat offenders are entitled to sentences that are not grossly disproportionate to their crimes." *Id.* at 907.

The appropriate analysis, applied in *Banyard, Ramirez* and *Crosby*, requires a finding that the application of the ACCA is unconstitutional as applied to Petitioner. Any fair analysis of each case and the facts in the instant case compels the conclusion that none of the sentences in any of the three cases were *as disproportionate* as the application of the ACCA to Petitioner. Therefore, this Court should find that the imposition of the mandatory minimum sentence under the ACCA is disproportionate and unconstitutional as applied to Petitioner.[10]

[10] Even the district court, at Petitioner's sentencing, stated: "And under *Shepard* I just don't think I have any choice but to impose it [ACCA], even though I think it is a grave nearly injustice." (Pet. App. 17) Furthermore, the court encouraged Petitioner to appeal the sentence. (Pet. App. 17)

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2006

United States Court of Appeals,Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Edison Pilgrim CRAWFORD, Defendant-Appellant.
**No. 05-4830.**

Submitted Jan. 5, 2006.
Decided April 6, 2006.

*1 Edison Crawford (Crawford) pled guilty to one count of being a felon-in-possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of possession of marijuana in violation of 21 U.S.C. § 844. With respect to his § 922(g)(1) conviction, the district court sentenced Crawford to fifteen years' imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which act mandates a minimum fifteen-year sentence when a defendant has at least three prior convictions for "violent felon[ies]" that were "committed on occasions different from one another." *Id.* The district court sentenced Crawford to one year imprisonment with respect to his conviction for possession of marijuana to run concurrent with his fifteen-year sentence. On appeal, Crawford makes three arguments in challenge to his sentence under the ACCA. We affirm.

Crawford first argues that in order to conclude that he had three burglary convictions which qualified as violent felonies under the ACCA, the district court necessarily looked beyond the face of the charging documents for those convictions in violation of the Sixth Amendment's jury-trial guarantee. Crawford's argument is without merit. A district court may

enhance a sentence based on the "fact of a prior conviction," *United States v. Thompson,* 421 F.3d 278, 282 (4th Cir.2005), *cert. denied,* — U.S. ---, 126 S.Ct. 1463, 164 L.Ed.2d 250 (2006), regardless of whether or not it was admitted to by the defendant or found by a jury so long as the facts necessary to support the enhancement "inhere in the fact of conviction" rather than being "extraneous to it," *id.* at 283. Facts necessary to support a sentencing enhancement inhere in the fact of conviction rather than being extraneous to it so long as they come from "the charging document, the terms of a plea agreement, the plea colloquy, the statutory definition, or any explicit finding of the trial judge to which the defendant assented to determine a disputed fact about a prior conviction." *United States v. Collins,* 412 F.3d 515, 521 (4th Cir.2005).

The ACCA defines the term "violent felony" in relevant part as "any crime ... that ... is burglary...." 18 U.S.C. § 924(e)(2)(B)(ii). In *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court "conclude[d] that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599, 110 S.Ct. 2143.

Our review of the record discloses that the district court did not look and did not need to look beyond the respective charging documents with respect to Crawford's prior convictions in order to determine that he had three prior

violent felony convictions. On their face, the charging documents for those convictions reveal that they involved crimes having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. Additionally, the charging documents reveal on their face that the burglaries occurred on occasions different from one another. Accordingly, the district court did not violate the Sixth Amendment's jury-trial guarantee in determining that he had three burglary convictions which qualified as violent felonies under the ACCA.

*2 Crawford argues second that his fifteen-year sentence under the ACCA is grossly disproportionate to his felon-in-possession conviction in violation of the Eighth Amendment. His argument is without merit. "As we have held before, a fifteen-year sentence under ACCA is neither disproportionate to the offense nor cruel and unusual punishment, and thus does not violate the Eighth Amendment." *United States v. Presley,* 52 F.3d 64, 68 (4th Cir.1995).

Finally, Crawford argues that the ACCA creates a separate crime such that the Sixth Amendment's jury-trial guarantee does not permit application of the ACCA unless the fact of a prior conviction is either charged by a grand jury and found by the trier of fact beyond a reasonable doubt or admitted by the defendant. Crawford's argument is without merit. In *United States v. Cheek,* 415 F.3d 349 (4th Cir.2005), *cert. denied,* --- U.S. ----, 126 S.Ct. 640, 163 L.Ed.2d 518 (2005), we recently rejected this identical argument in an ACCA case: "It is ... abundantly clear that the Sixth Amendment (as well as due process) does not demand that the mere fact of a

prior conviction used as a basis for a sentencing enhancement be pleaded in an indictment and submitted to a jury for proof beyond a reasonable doubt." *Id.* at 354.

For the reasons stated herein, we affirm Crawford's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed May 25, 2006

No. 05-4830
CR-02-42

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDISON PILGRIM CRAWFOD

Defendant – Appellant

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ORDER

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Appellant has filed a petition for rehearing. The Court denies the petition for rehearing. Entered for a panel composed of Judge Widener, Judge Gregory, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| United States of America | ) | |
| | ) | |
| vs. | ) | Criminal No. 3:02CR00042 |
| | ) | |
| Edison Pilgrim Crawford | ) | |

Plea Agreement

* * *

[2] I will enter a plea of guilty to a Superseding Information charging me with being a previously convicted felon in possession of firearms, in violation of Title 18, United States Code, Section 922(g)(1), and with knowingly possessing a controlled substance, in violation of Title 21, United States Code, Section 844. The maximum statutory penalty for the firearms charge, as state above, is a fine of $250,000 and 10 years imprisonment, and a period of supervised release.

* * *

[3] I agree that Sentencing Guideline Section 2K2.1 is applicable to my firearms offense. I understand and agree that my offense involved between 8 and 24 firearms. I further understand and agree that my offense level should not be reduced under U.S.S.G. § 2K2.1(b)(2).

* * *

[4] I understand that the United States, through its attorney, will recommend that the Court grant me a two (2) level

reduction in my offense level for acceptance of responsibility under Guideline Section 3E1.1(a). I must clearly demonstrate acceptance of responsibility for my criminal offenses. Because I meet the listed criteria, the United States agrees that I should be granted an additional one (1) level reduction pursuant to Guideline Section 3E1.1(b).

[4] If I fulfill my obligations under this plea agreement and accept responsibility for my conduct, the Unites States agrees to recommend the following sentence: a sentence of incarceration at the low end of the applicable sentencing guidelines range.

* * *

[5] I agree that after my full and fair sentencing hearing, I will not then appeal any sentencing guidelines factors or the Court's application of the sentencing guidelines factors to the facts of my case. I am knowingly and voluntarily waiving any right to appeal sentencing guidelines factors, and am voluntarily willing to rely on the Court in sentencing me under the Sentencing Guidelines.

* * *

[6] I further agree to waive any right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon me by the Court.

[6] I understand that except as provided for in this plea agreement, there will be no further prosecution of me in the Western District of Virginia for any matters about which the

United States has specific knowledge gained from the investigation that gave rise to the charges contained in this Indictment.

IN THE UNITED STATES DISTRICT COURT
WESTER DISTRICT OF VIRGINIA (Charlottesville)

| | |
|---|---|
| United States of America, | .No. 3:02-CR-0042-1 |
| Plaintiff, | .Charlottesville, Virginia |
| | June 30, 2003 |
| Vs. | |
| Edison Pilgrim Crawford, | |
| Defendant. | |

. . . . . ./

TRANSCRIPT OF PLEA
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

* * *

[7] THE COURT: Would you also tell him at this time what the maximum, minimum punishment range is?

MS. HEALEY: Yes, Your Honor.

For Count 1, which is the felony possession charge, the maximum penalties are up to ten years in prison, a $250,000 fine, and a period of supervised release.

As to Count 2, Count 2 he is pleading to a misdemeanor possession charge that's punishable by up to one year and a one hundred thousand dollar fine, as well as a period of supervised release.

* * *

[13] THE COURT: It is the finding of the Court, in the United States versus Edison Pilgrim Crawford, that the Defendant is fully competent and capable of entering an informed plea, that his plea of guilty is a knowing and voluntary plea, supported by an independent basis in fact, containing each of the essential elements of the offense. [14] His plea is, therefore, accepted and he's now adjudged guilty of the offense.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| United States of America | ) | |
| | ) | Presentence Investigation |
| vs. | ) | Report |
| | ) | |
| Edison Pilgrim Crawford | ) | |

Docket No: 3:02 CR 00042-001

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Prepared for: Honorable Norman K. Moon
U.S. District Judge
Prepared by: Rob H. Harper
Senior U.S. Probation Officer
255 West Main St., Room 308
Charlottesville, VA 22902

* * *

[6]

| Date of Arrest | Conviction | Date Sentence Imposed | Guideline | Points |
|---|---|---|---|---|
| 38. 02/12/1971 (age 19) | Breaking & Entering (3 counts). Circuit Court Greene County, VA Indictment date of 03/15/1971 | 05/17/1971 2 years, 1 year suspended, 5 years probation upon release on each count; all time to run concurrent. | 4A1.2(e)(3) | 0 |

* * *

[7] The defendant was represented by appointed counsel, David Dickey on all three counts. A Virginia State Presentence Report, prepared for the Greene Country Circuit Court indicates that Edison Crawford, along with four of his brothers broke into Powell's Garage on January 31, and February 2, 1971, and into L.L. Shifflett's storehouse on February 1, 1971. On the two occasions that Crawford and his brothers broke into Powell's Garage they stole over $1,000 in merchandise. When they broke onto L.L. Shifflett's storehouse, they stole $100 in merchandise. Most of the merchandise from Powell's Garage was recovered in the Augusta County, Virginia area.

[7] 41. The total of the criminal history points is 0. According to the Sentencing Table at U.S.S.G. Chapter 5, Part A, 0 criminal history points establish a criminal history category of I.

March 23, 1971

Commonwealth

v. Indictment No. 1

Edison Crawford

This day came again the Attorney for the Commonwealth, and EDISON CRAWFORD, who stands indicted of a felony, to-wit:

On the 31st day of January, 1971 and in said County, unlawfully and feloniously did break and enter the garage of Powell Brothers with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Thousand ($1,000.00) Dollars....

March 23, 1971

Commonwealth

v. Indictment No. 2

Edison Crawford

This day came again the Attorney for the Commonwealth, and EDISON CRAWFORD, who stands indicted of a felony, to-wit:

On the 3rd day of February, 1971 and in the aforesaid County, unlawfully and feloniously did break and enter the garage of Powell Brothers with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Thousand ($1,000.00) Dollars....

March 23, 1971

Commonwealth

v. Indictment No. 3

Edison Crawford

This day came again the Attorney for the Commonwealth, and EDISON CRAWFORD, who stands indicted of a felony, to-wit:

On the 1st day of February, 1971 and in said County, unlawfully and feloniously did break and enter the storehouse of L.L. Shifflett with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Hundred ($100.00) Dollars....

May 17, 1971

VIRGINIA: IN THE CIRCUIT COURT OF GREENE COUNTY

PRESENT: HONORABLE DAVID F. BERRY, JUDGE

Commonwealth

v. Felony No. 1

Edison Crawford

This day came again the Attorney for the Commonwealth and EDISON CRAWFORD who stands convicted of a felony, to-wit:

On the 31st day of January, 1971 and in the said County, unlawfully and feloniously did break and enter the garage of Powell Brothers with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Thousand ($1,000.00) Dollars....

May 17, 1971

VIRGINIA: IN THE CIRCUIT COURT OF GREENE COUNTY

PRESENT: HONORABLE DAVID F. BERRY, JUDGE

Commonwealth

v. Felony No. 2

Edison Crawford

This day came again the Attorney for the Commonwealth and EDISON CRAWFORD who stands convicted of a felony, to-wit:

On or about the 3rd day of February, 1971 and in the said County, unlawfully and feloniously did break and enter the garage of Powell Brothers with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Thousand ($1,000.00) Dollars....

May 17, 1971

VIRGINIA: IN THE CIRCUIT COURT OF GREENE COUNTY

PRESENT: HONORABLE DAVID F. BERRY, JUDGE

Commonwealth

v. Felony No. 3

Edison Crawford

This day came again the Attorney for the Commonwealth and EDISON CRAWFORD who stands convicted of a felony, to-wit:

On or about the 1st day of February, 1971 and in the said County, unlawfully and feloniously did break and neter [sic] the storehouse of L.L. Shifflett with intent to commit larceny therein and did take, steal, and carry away certain goods and chattels of a value in excess of One Hundred ($100.00) Dollars....

IN THE UNITED STATES DISTRICT COURT
WESTER DISTRICT OF VIRGINIA
Charlottesville Division

United States of America,
Plaintiff,

vs.

No. 3:02cr42-1
Tampa, Florida [sic]
July 22, 2005

Edison Pilgrim Crawford,
Defendant.

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

[21] THE COURT: And under Shepard I just don't think I have any choice but to impose it, even though I think it is a grave nearly injustice. ...

[23] THE COURT: Well, I'm not – I'm not limiting his right to appeal if he needs – I mean, I think you ought to appeal.